

**Record on Appeal – Tab 8**

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1 Friday, February 16, 2007

10:25 o'clock a.m.

2 P R O C E E D I N G S

3 THE COURT: Okay. That brings us to the Acaya matter.

4 MR. MERKIS: Once again, Your Honor, Trevor Merkis for  
5 the debtor.

6 MR. CRAM: Good morning, Your Honor. Don Cram with  
7 Severson and Werson on behalf of objecting creditor, Wells  
8 Fargo.

9 THE COURT: Okay. Well, good morning to both of you.

10 I've got to say that I really appreciated the extra  
11 effort that you both went to in preparation of your briefs. I  
12 think these are really significant issues that you've raised.  
13 And it was clear to me that you put a great deal of thought and  
14 energy into, each of you, presenting your sides.

15 MR. MERKIS: Thank you, Your Honor.

16 THE COURT: Is there anything you'd like to -

17 MR. CRAM: Thank you, Your Honor. It is a -

18 THE COURT: - add to your briefs?

19 MR. MERKIS: We're prepared to submit, Your Honor.

20 THE COURT: Okay. Mr. Cram?

21 MR. CRAM: Just a couple of things briefly, Your  
22 Honor.

23 Thank you for - for reviewing the briefs. It is an  
24 important issue and one in first impression with respect to this  
25 District and the Ninth Circuit for that matter.

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1 And I think the pleadings, the briefs point out that  
2 there's really, you know, three options and three lines of cases  
3 that the courts are going nationally.

4 And one is the courts that are falling - that are  
5 falling into the category of these types of situations are, in  
6 fact, 910 claims. Those cases that hold that there's a dual  
7 status, meaning that there's a purchase money security interest  
8 that's going to be noncramdownable.

9 And, finally, the cases that hold that where there's  
10 anything in addition to the purchase money that the entire  
11 amount is transformed and we follow the old rule.

12 And Wells Fargo thinks that, initially, that this  
13 should be held as a 910 claim because California law, both the  
14 Commercial Code, as well as the Motor Vehicle Code, couches the  
15 situation that was decided in *In re Graupner*. And really that's  
16 a well-decided case.

17 And I think it goes to great lengths to look at the  
18 state - the status of the state law to try to determine what  
19 Congress meant by "purchase money security interest."

20 And I think if the Court looks at that case and then  
21 looks at the California Commercial Code, as well as the Motor  
22 Vehicle Code in California, it will find that both the language  
23 of those codes is identical to the Georgia code in *Graupner*.

24 And on that basis, Wells Fargo would ask that the  
25 Court hold consistently with *Graupner*.

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1           Alternatively, Wells Fargo would state that this is a  
2 dual-status case. In that respect I think *Peaslee* can be  
3 distinguished, as well as *Matthews*.

4           In the New York case in *Peaslee*, the court essentially  
5 couldn't -- was unable to determine what the amount was actually  
6 financed as purchase money and what amount constituted the  
7 negative trade-in.

8           And I think the court ruled the way it did because it  
9 felt that the creditor hadn't met its evidentiary burden in  
10 pulling those two numbers out for the court.

11           And I haven't seen the motor vehicle contract in that  
12 New York case, but the California motor vehicle contracts are  
13 very clear in that they explicitly set forth what -- the amount  
14 that was financed, as well as the negative trade-in amount.

15           And so it can be -- the Court can easily determine what  
16 amounts constituted the purchase price for the vehicle, as  
17 opposed to the amounts financed for the negative trade-in.

18           And so I believe *Peaslee* is distinguishable. And the  
19 case of *In re Matthews*, that's distinguishable in that that was  
20 a complete refinance where there was no new merchandise being  
21 purchased. It was just a complete refinance.

22           And so it's understandable how the Court held in the  
23 *Matthews* case that the purchase money security interest was  
24 completely transformed where the full amount is refinanced.

25           And I just do appreciate the Court looking at this

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1 matter carefully. And that's all I have to add, Your Honor.

2 MR. MERKIS: If I may, very briefly, Your Honor.

3 THE COURT: Yes.

4 MR. MERKIS: Well, obviously I disagree with counsel  
5 with respect to *Peaslee* being distinguishable here, while the  
6 California sales contract does differentiate between the  
7 negative trade-in. And, as Don Cram indicated, I haven't seen  
8 the contract in the *Peaslee* case.

9 However, I do not think that simply because it was  
10 broken down in the contract it will be easy for this Court to  
11 determine which amount is purchase money and which is not.

12 For instance, the payments received prepetition, would  
13 those be applied to the purchase money amount or to the  
14 nonpurchase money amount. And it would be almost to unwind the  
15 – unwind and have the accounting process that would be able to  
16 come out with an amount today that's purchase money and  
17 nonpurchase money.

18 So just like in *Peaslee*, it's going to be almost  
19 impossible for the Court to differentiate these. And based upon  
20 that, we think the transformation rule is better, and the value  
21 should be determined per 506(a)(2) to be the retail value.

22 THE COURT: You know I've learned that nothing is ever  
23 easy. So I am going to give this a good look, and I really –

24 I'm sorry. Mr. Cram, do you have anything further to  
25 add?

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1 MR. CRAM: I don't, Your Honor. Just - I guess - I  
2 mean from a procedural standpoint - I mean depending on how the  
3 Court rules, there may be some additional issues as to what the  
4 actual value is.

5 So I guess, depending on how the Court rules, it may  
6 be worthwhile to actually set forth a continued hearing date for  
7 a status conference to see where we are after the Court's  
8 ruling.

9 THE COURT: Okay. I will include a continued hearing  
10 date in my decision when I issue it.

11 MR. MERKIS: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. CRAM: Thanks, Your Honor.

14 THE COURT: Thank you both very much.

15 (The hearing was concluded at 10:32 o'clock a.m.)

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State of California                                 )  
  )     SS.  
County of San Joaquin                            )

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify I am not a party to nor in any way interested in the outcome of this matter.

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